Uniphoenix Corp Bhd & Anor v Wong Chan Ming & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R1–25–2 OF 1999
RAUS J
19 APRIL 2004

Administrative Law — Remedies — Certiorari — Application to quash decision of Industrial Court — Change of ownership — Company regarded as employer during incidence of dismissal — Whether decision tainted with irregularities — Whether relevant matters considered — Whether decision to be quashed

Labour Law — Employment — Termination of employment — Change of ownership — Employer status — Constructive dismissal — Claim for — Whether company properly identified as employer at time of dismissal

The first applicant's manufacturing operations, located in Shah Alam, were conducted through seven companies, namely, Flexipak, Steripak, UCHT, USM, Star Art, Poly Paks and Poly Paks Singapore. The second applicant was the first applicant's wholly-owned subsidiary and served as the first applicant's management services company. Prior to 1990, the higher ranking employees for the Shah Alam operations were appointed by and placed on the payroll of the second applicant. Subsequent to 1990, the employees for the Shah Alam operations were made by the first applicant. The first, second and fourth respondents were employed by the second applicant. The third respondent was initially appointed by Mapek Industries Sdn Bhd ('Mapek') as a shipping/purchasing assistant in 1978. Mapek was subsequently purchased by the second applicant and consequently, the first applicant appointed the third respondent as the head of marketing in the Shah Alam operations. The fifth and sixth respondents were employed by the first applicant. By four separate agreements made on 21 December 1995, Steripak, Flexipak, Star Art and Poly Paks disposed of their machinery and factory equipment to the eighth respondent. By a sale of shares agreement dated 3 January 1996, the second applicant sold the shares in Steripak, Flexipak, Star Art and Poly Paks to the seventh respondent. In January 1996, the first applicant through UCHT, entered into an agreement to dispose of its factories, land and building at Shah Alam to the seventh respondent. After the above transactions, the first applicant sent memo to three of the first respondent's subordinates to report to other named officers. Further, heads of departments who had been reporting to the first respondent were instructed by the first applicant to report to other managers. The first applicant then sent another memo informing the first, third, fourth, fifth and sixth respondents that certain divisions of Star Art had ceased operations and they were requested to cease the purchase and delivery of items for the two divisions. The first applicant sent another memo removing further duties of the first and the second respondent. These and a number of other events led

the first to the sixth respondents to send a letter dated 14 March 1996 to the first applicant, wherein they considered themselves constructively dismissed.

The first applicant replied the first to sixth respondents stating that the matter had been referred to the seventh and eighth respondents as the first applicant was no longer responsible for their affairs as Star Art and Poly Paks had already been divested to the seventh and eighth respondents.

The first to the sixth respondents' representations were referred to the Industrial Court. The seventh and eighth respondents were parties which had been ordered to be joined by the Industrial Court. The Industrial Court held that the first and sixth respondents were employees of the applicants and that they had been constructively dismissed by the applicants. The Industrial Court found that reinstatement was not a viable remedy and awarded compensation and back wages to the first to the sixth respondents. This was an application by the applicants for an order of certiorari to quash the Industrial Court's award. The issue to be determined here was whether the Industrial Court had committed a jurisdictional error in concluding that the applicants were the employers of first to sixth respondents purported to treat themselves as constructively dismissed.

Held, dismissing the application:

(1) From the record, there was no evidence before the Industrial Court to show that there was in existence any agreement or arrangement between the applicants and the seventh or eighth respondents regarding the first to sixth respondents' employment status or that the seventh or eighth respondents had offered employment to the first to the sixth respondents, which offers were accepted by the first to sixth respondents. Thus, the Industrial Court had rightly concluded that the applicants were the employers of the first to the sixth respondents (see para 21).

(2) According to the learned Chairman, the sale of shares agreement expressly stipulated for the fulfilment of certain conditions precedent for the purpose of determining the completion date and the last condition was only fulfilled in September 1996. The Industrial Court also held that there was a joint management from 1 March 1996 to September 1996, during which time the operations were conducted in the name of first applicant. Thus, when the Industrial Court held that 'the court cannot possibly hold that ESPI (the seventh respondent) is the new employer of the claimants', it had taken into account all the relevant matters into consideration (see paras 28–29).

(3) The learned Chairman of the Industrial Court had correctly distinguished the *Kumpulan Kamuning* case with the instant case. The *Kumpulan Kamuning*'s case was distinguishable because in that case, the agreement was for the sale and purchase for the active undertaking of the estate. In contrast,

there was only a sale of assets and sale of shares in the present case. Further, in the *Kumpulan Kamuning*'s case, the agreement provided that the actual completion of the transfer of the undertaking shall be completed as soon as possible after the execution thereof whereas in the instant case, the completion date was defined as 120 days from the date of the share sale agreement or on the day when the last condition precedent was fulfilled. Thus, the Industrial Court did not err in law or acted in excess of its jurisdiction when it held that 'the court cannot possibly hold that ESPI is the new employer of the claimants'. The first applicant continued, until the date of the alleged constructive dismissal, to be the employer of the first to the sixth respondents (see paras 32–33); *Kumpulan Kamuning Sdn Bhd v Rajoo & 200 Others* [1983] 2 MLJ 400 distinguished.

[**Bahasa Malaysia summary**

Operasi perkilangan pemohon pertama, yang terletak di Shah Alam, dikendalikan melalui tujuh syarikat, iaitu, Flexipak, Steripak, UCHT, USM, Star Art, Poly Paks dan Poly Paks Singapura. Pemohon kedua adalah syarikat milik sepenuhnya pemohon pertama dan berkhidmat sebagai syarikat pengurusan perkhidmatan pemohon pertama. Sebelum 1990, pekerja-pekerja jawatan tinggi untuk operasi Shah Alam dilantik oleh dan diletakkan dalam senarai gaji pemohon kedua. Selepas 1990, pekerja-pekerja untuk operasi Shah Alam dibuat oleh pemohon pertama. Responden-responden pertama, kedua dan keempat diambil bekerja oleh pemohon kedua. Responden ketiga pada mulanya dilantik oleh Mapek Industries Sdn Bhd ('Mapek') sebagai penolong perkapalan/pembelian dalam tahun 1978. Mapek kemudiannya dibeli oleh pemohon kedua dan berikutnya, pemohon pertama melantik responden ketiga sebagai ketua pemasaran untuk operasi Shah Alam. Responden-responden kelima dan keenam diambil bekerja oleh pemohon pertama. Melalui empat perjanjian berasingan yang dibuat pada 21 Disember 1995, Steripak, Flexipak, Star Art dan Poly Paks menjual peralatan mesin dan perkilangan mereka kepada responden kelapan. Melalui perjanjian jualan saham bertarikh 3 Januari 1996, pemohon kedua menjual saham-saham Steripak, Flexipak, Star Art dan Poly Paks kepada responden ketujuh. Dalam bulan Januari 1996, pemohon pertama melalui UCHT, memasuki perjanjian untuk menjual kilang-kilang, tanah dan bangunan-bangunannya di Shah Alam kepada responden ketujuh. Selepas transaksi-transaksi di atas, pemohon pertama menghantar memo kepada tiga daripada orang bawahan responden pertama untuk melaporkan kepada pengurus-pengurus yang lain. Pemohon pertama kemudian menghantar satu lagi memo memaklumkan responden-responden pertama, ketiga, keempat dan keenam bahawa bahagian tertentu Star Art telah tamat beroperasi dan mereka diminta menghentikan pembelian dan penghantaran item-item untuk dua bahagian. Pemohon pertama telah menghantar satu lagi memo melucutkan tanggungjawab seterusnya daripada responden pertama dan kedua. Kejadian ini dan beberapa kejadian

lain menyebabkan responden-responden pertama hingga keenam menghantar sepucuk surat bertarikh 14 Mac 1996 kepada pemohon pertama, yang menyatakan mereka menganggap diri mereka telah dipecat secara konstruktif.

Pemohon pertama memberi jawapan kepada responden-responden pertama hingga keenam menyatakan bahawa perkara tersebut telahpun dirujuk kepada responden-responden ketujuh dan kelapan oleh kerana pemohon pertama tidak lagi bertanggungjawab untuk urusan-urusan mereka kerana Star Art dan Poly Paks telahpun dilucutkan kepada responden-responden ketujuh dan kelapan.

Representasi responden-responden pertama hingga keenam telah dirujuk ke Mahkamah Perusahaan. Responden-responden ketujuh dan kelapan merupakan pihak-pihak yang diperintahkan untuk digabungkan oleh Mahkamah Perusahaan. Mahkamah Perusahaan memutuskan bahawa responden-responden pertama hingga keenam adalah pekerja-pekerja pemohon-pemohon dan bahawa mereka telah dipecat secara konstruktif oleh pemohon-pemohon. Mahkamah Perusahaan mendapati bahawa pengembalian jawatan bekerja bukan satu remedi yang berdaya maju dan mengawardkan pampasan dan gaji tunggakan kepada responden-responden pertama dan keenam. Ini adalah satu permohonan oleh pemohon-pemohon untuk satu perintah certiorari untuk membatalkan award Mahkamah Perusahaan. Persoalan yang perlu ditentukan di sini adalah sama ada Mahkamah Perusahaan telah melakukan satu kesilapan bidang kuasa semasa memutuskan bahawa majikan-majikan responden-responden pertama hingga keenam adalah pemohon-pemohon pada masa responden-responden pertama hingga keenam bermaksud untuk menganggap diri mereka sebagai dipecat secara konstruktif.

Diputuskan, menolak permohonan tersebut:

(1) Berdasarkan rekod, tiada keterangan di hadapan Mahkamah Perusahaan untuk menunjukkan bahawa terdapat apa-apa perjanjian atau aturan antara pemohon-pemohon dan responden-responden ketujuh atau kelapan berhubung status pekerjaan pertama hingga keenam atau bahawa responden-responden ketujuh atau kelapan telah menawarkan pekerjaan kepada responden-responden pertama hingga keenam, yang mana tawaran tersebut telah diterima oleh responden-responden pertama hingga keenam. Oleh itu, Mahkamah Perusahaan dengan betul telah memutuskan bahawa pemohon-pemohon adalah majikan-majikan kepada responden-responden pertama hingga keenam (lihat perenggan 21).

(2) Menurut Pengerusi yang bijaksana, perjanjian jualan saham tersebut dengan jelas menetapkan perlunya pematuhan pra syarat tertentu bagi tujuan menentukan tarikh penyelesaian dan syarat terakhir hanya dipenuhi dalam bulan September 1996. Mahkamah Perusahaan juga memutuskan bahawa terdapat pengurusan bersama daripada 1 Mac 1996 hingga

September 1996, dalam masa itu operasi dikendalikan atas nama pemohon pertama. Oleh itu, apabila Mahkamah Perusahaan memutuskan bahawa 'the court cannot possibly hold that ESPI (the seventh respondent) is the new employer of the claimants', ia telah mengambilkira semua perkara relevan yang perlu dipertimbangkan (lihat perenggan 28–29).

(3) Pengerusi yang bijaksana Mahkamah Perusahaan telah dengan betul membezakan kes *Kumpulan Kamuning* dengan kes semasa. Kes *Kumpulan Kamuning* dibeza kerana dalam kes tersebut, perjanjian bukan untuk jual beli akujanji jelas ke atas estet tersebut. Sebaliknya, hanya terdapat jualan aset dan jualan saham dalam kes semasa. Tambahan pula, dalam kes *Kumpulan Kamuning,* perjanjian tersebut memperuntukkan bahawa penyelesaian sebenar pemindahan akujanji tersebut hendaklah diselesaikan secepat mungkin selepas penyempurnaan tersebut manakala dalam kes semasa, tarikh penyelesaian ditafsirkan sebagai 120 hari dari tarikh perjanjian jualan saham atau pada hari apabila para syarat terakhir dipenuhi. Oleh itu, Mahkamah Perusahaan tidak terkhilaf dari segi undang-undang atau bertindak melampaui bidang kuasanya apabila ia memutuskan bahawa 'the court cannot possibly hold that ESPI is the new employer of the claimants'. Pemohon pertama terus, sehingga tarikh pemecatan konstruktif yang dikatakan itu, menjadi pekerja responden-responden pertama hingga keenam (lihat perenggan 32–33); *Kumpulan Kamuning Sdn Bhd v Rajoo & 200 Others* [1983] 2 MLJ 400 dibeza.]

Notes

For cases on certiorari, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 185–393.

For cases on dismissal, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 849–873.

For cases on Industrial Court awards, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1241–1288.

Cases referred to

Kumpulan Kamuning Sdn Bhd v Rajoo & 200 Others [1983] 2 MLJ 400 (distd)

Uniphoenix Corp Bhd & Anor v Wong Chan Ming & Ors [1998] 3 ILR 914 (refd)

Legislation referred to

Industrial Relations Act 1967 s 20

Suganthi Singam (Shearn Delamore & Co) for the applicants.

P Vickneswaran (Murugavell Arumugam & Co) for the respondents.

Raus J:

[1] This is an application by the applicants for an order of certiorari to quash the Industrial Court Award No 632 of 1998 handed down on 30 November 1998. In the said award, the Industrial Court found that the first to sixth respondents were employees of the applicants and they had been constructively dismissed by the applicants.

[2] Briefly, the essential facts that led to this application are as follows.

[3] The first applicant is a public listed company. Its manufacturing operations is located in Shah Alam, Selangor and are conducted through seven companies, to wit, Flexipak Sdn. Bhd., Steripak Sdn Bhd, Uniphoenix CHT Sdn Bhd, Uniphoenix Star Maid Sdn Bhd, Star Art Sdn Bhd, Poly Paks (Export) Sdn Bhd and Poly Paks Singapore (Pte) Ltd. Except for Uniphoenix Star Maid Sdn Bhd, all the above companies are wholly owned subsidiaries of the second applicant. The second applicant is in turn a wholly-owned subsidiary of the first applicant. Apart from the aforesaid companies, the first applicant has more than thirty subsidiaries and associated companies in diverse activities including property development, engineering and trading, financial services manufacturing and marketing.

[4] According to Mr Lew Kwong Ann (COW-1), the general manager of the corporate finance and accounting division of the first applicant, the second applicant served basically as a management services company for the first applicant group of companies and was involved in the processing of the payroll. For the Shah Alam operations, the lower ranking employees were employed by the subsidiaries. Before 1990, the higher ranking employees such as executives and management staff were appointed by and placed on the payroll of the second applicant. After 1990, the appointments and promotions were made by the first applicant.

[5] The first respondent, Wong Chan Ming was initially employed by the second applicant as Netlon executive in the marketing division of the company on 15 September 1983. He was subsequently promoted to the position of operations manager and deputy general manager by the first applicant. Vide a letter dated 20 June 1994 the first applicant appointed the first respondent as head of its manufacturing plant in Shah Alam with effect from 1 June 1994. He was accountable for the overall factory operations and business performance of Flexipek Sdn. Bhd., Steripak Sdn. Bhd., Uniphoenix CHT Sdn Bhd, Uniphoenix Star Maid Sdn Bhd, Star Art Sdn Bhd, Poly Paks (Export) Sdn Bhd and Poly Paks Singapore (Pte) Ltd.

[6] The second respondent, Kong Wai Hong was offered employment by the first applicant as a Sales Executive assigned to Windows Division of Star Art Sdn Bhd by a letter dated 4 January 1993. He accepted the offer on 15 February 1993. The letter of appointment expressly stated that Star Art

Sdn Bhd was a wholly-owned subsidiary of the first applicant. The terms and conditions of employment applicable to the second respondent were governed by the first applicant scheme of service for executives and managers. By a letter dated 27 February 1995, the first applicant promoted him to the position of sales manager in grade level 3 effective 1 January 1995.

[7] The third respondent, Diong Chok Yeh @ Steven Diong was initially appointed by Mapek Industries Sdn Bhd as a Shipping/Purchasing Assistant with effect from 1 October 1978. Sometime in 1980, Mapek Industries Sdn Bhd was purchased by the second applicant. Vide a letter dated 3 April 1982, the second applicant promoted the third respondent to the position of stores officer, grade III B with effect from 1 January 1982. The first applicant by a letter dated 20 July 1994 appointed him as Head of Marketing in Shah Alam operations with effect from 1 July 1994. In this position, he was accountable for all the marketing functions and business performances of the aforesaid seven subsidiaries operating in Shah Alam.

[8] The fourth respondent, Koh Yoke Eng, was first employed by the second applicant in March 1973 as a Receptionist and subsequently as a clerk. She was promoted as a Confidential Assistant in the marketing division of the second applicant with effect from 1 July 1982 *vide* its letter dated 7 June 1982. She was later promoted as secretary in the marketing department of Star Art Sdn Bhd with effect from 1 June 1989 *vide* a letter from Star Art Sdn Bhd dated 1 June 1989. The first applicant *vide* its letter dated 18 March 1995 promoted her to the position of executive secretary to the general manager with effect from 1 January 1995. The general manager then was the first respondent who was the head of the Shah Alam plant and responsible for all the activities of the Shah Alam operations.

[9] The fifth respondent, Karnasan a/l Malayapan was appointed by the first applicant with effect from 5 April 1994 as a Manufacturing Executive and confirmed with effect from 4 October 1994. On 10 July 1994, he was appointed as head of production. He was then promoted as production manager with effect from 1 January 1995 by the first applicant.

[10] The sixth respondent, Ponnaya a/l Doraisamy was employed by the first applicant by a letter dated 3 August 1994 with effect from 4 October 1994 as an Executive for the engineering and maintenance of the first applicant's operations at Shah Alam. He was appointed as head of the engineering and maintenance department which was in charge of the maintenance of plant and equipment in the seven subsidiaries at Shah Alam. He was confirmed in the said appointment by the first applicant's letter dated 27 April 1995.

[11] The seventh and eighth respondents, ESPI Corporation Sdn Bhd and ESPI Industries Sdn Bhd respectively are parties which have been ordered to be joined by the Industrial Court. They are not subsidiaries or associate companies of the first applicant or any other company within the first applicant's

group of companies. They became involved in these proceedings by virtue of several transactions they entered into with the second applicant and its subsidiaries. The transactions were:

(a) Four separate agreements dated 21 December 1995 involving the eighth respondent and Steripak Sdn Bhd, Flexipak Sdn Bhd, Star Art Sdn Bhd and Poly Paks (Export) Sdn Bhd, whereby each of the said four subsidiaries disposed of their machinery and factory equipment as described in the Schedule I attached to each of the agreements to the eighth respondent.

(b) A sale of shares agreement dated 3 January 1996, whereby the second applicant agreed to sell its issued and paid up shares in the aforesaid four subsidiaries to the seventh respondent. In January 1996, the first applicant through its wholly owned subsidiaries Uniphoenix CHT Sdn Bhd entered into an agreement to dispose of its factories, land and building at Shah Alam to the seventh respondent.

[12] After the above transactions a number of events took place which led the first to the sixth respondents sending a letter dated 14 March 1996 to the first applicant, where they considered themselves constructively dismissed. The events are as follows:

(a) Three memos bearing the first applicant's letterhead dated 9th January, 1996, directed three subordinates of the first respondent to report to other named officers with immediate effect. The memos emanated from one Shahedan Shafie who described himself as 'Legal and HR Director'. Heads of Departments who had been reporting to the first respondent were instructed by the first applicant to report to other managers. The second respondent, the head of marketing was instructed to report to one Hanif Pilus, the director of marketing with effect from 9 January 1996. The sixth respondent, the head of production was instructed to report to Mr Tee Guan Leong. The fifth respondent, the head of engineering and maintenance was also instructed to report to Mr Tee Guan Leong. Prior to 9 January 1996, the said Mr Tee Guan Leong reported to the sixth and fifth respondents.

(b) A memo bearing the first applicant's letter head dated 15 January 1996, informing the first, third, fourth, fifth and sixth respondents that the operations of the Carpentary and UPVC Division of Star Art Sdn Bhd ceased operations. They were requested to cease purchases and deliveries of items for the two divisions. The memo was signed by one Encik Abu Bakar Sulaiman who was described as Managing Director.

(c) A memo bearing the first applicant's letterhead dated 19 January 1996, signed by Encik Abu Bakar removing further duties of the first and the second respondent.

(d) A memo bearing the first applicant's letterhead dated 1 February 1996 informed the first respondent that all purchase and service orders had to be approved by the Head of the respective departments and authorized only by Hanif Pilus and Abu Bakar Sulaiman. The third, fifth and sixth respondents were also instructed to comply with the aforesaid instructions.

(e) The first to sixth respondents were not paid of their February 1996 salaries. On 11 March 1996, they submitted a memorandum to the first applicant asking for payment of their February 1996 salaries.

(f) On 14 March 1996, the first to sixth respondents received a facsimile transmission of a letter from the first applicant dated 12 March 1996 acknowledging the non-payment of first to sixth respondents' salaries and went on to state that the first applicant was advancing their salaries.

(g) On 13 March 1996, a memo bearing the eighth respondent's letterhead was received by the first, second, third, fifth and sixth respondents requesting them to vacate their rooms. They were temporarily placed in the conference room.

(h) The first to sixth respondents were not paid of their outstanding expenses claims. They submitted a memo to Abu Bakar Sulaiman, copies of which were sent to the first applicant's top management requesting for the payment of their unpaid expenses claims for January–March, 1996.

(i) On 11 March 1996, shortly after the submission of the above mentioned request, the second to sixth respondents received from the first applicant, a carbon copy of a letter dated 12 January 1996, addressed to the Inland Revenue Department informing the Department that they had been transferred from the second applicant to other companies in the first applicant group of companies, namely third, fifth and sixth respondents to Poly Paks, second and fourth to Star Art Sdn. Bhd.

[13] The first applicant, upon receipt of the first to sixth respondents' letters dated 14 March 1996, claiming for a constructive dismissal, informed the first to sixth respondents *vide* the respective letters sent to them that the matter had been referred to the seventh and eighth respondents as it was no longer responsible for their affairs as Star Art Sdn Bhd and Poly Paks Sdn Bhd had already been divested to the seventh and eighth respondents.

[14] The first to the sixth respondents then, set in motion the procedure under s 20 of the Act. Eventually their representations were individually referred to the Industrial Court by the honourable minister of human resources. The aforesaid references were registered as Industrial Court Cases No 8/4-526/96, 8/4-527/96, 8/4-98/97, 8/4-85/97, 8/4-89/97 and 8/4-545/96 respectively. As the aforesaid references arose out of the same circumstances, upon the request of the respective parties to the proceedings, the Industrial Court directed that the five cases be jointly heard with that of the first respondent,

that is, the Industrial Court case No. 8/4-545/96. During the course of the proceedings the first to the sixth respondents had applied successfully to join *inter alia* the seventh and eighth respondents as parties in the proceedings.

[15] On 30th November, 1998 the Industrial Court handed down its decision in Award No. 632 of 1998. The Industrial Court held that the first and the sixth respondents were employees of the applicants and that they had been constructively dismissed by the applicants. The Industrial Court subsequently handed down the remedy to the first to the sixth respondents in six individual awards that is, Award 682 of 1998, 681 of 1998, 685 of 1998, 680 of 1998, 684 of 1998 and 685 of 1998. In all the awards, the Industrial Court found that reinstatement was not a viable remedy. In *lieu* thereof, the Industrial Court awarded compensations and back wages as follows:

(1)	First respondent	RM110,000 (RM8,800 x 12.5) as compensation RM105,600 (RM8,800 x 12) as backwages.
(2)	Second respondent	RM7,050 (RM2,350 x 3) as compensation. RM28,200 (RM2,350 x 12) as backwages.
(3)	Third respondent	RM78,750 (RM4,500 x 17.5) as compensation. RM54,000 (RM4,500 x 12) as backwages.
(4)	Fourth respondent	RM48,300 (RM2,100 x 23) as compensation. RM25,200 (RM2,100 x 12) as backwages.
(5)	Fifth respondent	RM6,400 (RM3,200 x 2) as compensation. RM43,200 (RM3,200 x 12) as backwages.

(6) Sixth respondent	RM3,937.50 (RM2,625 x 1.5) as compensation. RM31,500 (RM2,625 x 12) as backwages.

[16] The applicants' challenge in this case is in respect of Award No 632 of 1998 where the Industrial Court found that the first to sixth respondents were employees of the applicants and they had been constructively dismissed by the applicants.

[17] Before this court the issue whether the first to sixth respondents had been constructively dismissed was not raised by the applicants. The main issue raised by the applicants is that the Industrial Court had committed a jurisdictional error in concluding that the employers of the first to sixth respondents were the applicants at the time the first to sixth respondents purported to treat themselves as constructively dismissed.

[18] Thus, the crucial issue to be determined in this application is, who was the employer of the first to the sixth respondents on 14 March 1996 that is the date of the first and sixth defendants claiming constructive dismissal. The learned chairman of the Industrial Court found as follows:

> It is the court's finding that the claimants were not employed by any of the said four subsidiaries. The claimants had been merely assigned to work and were accordingly stationed at the Shah Alam manufacturing complex of the company. They remained throughout as employees of UCB and appeared in the payrolls of API, the management company for the UCB group of companies. Neither the sale of the business of the subsidiaries or the sale of the shares of the said subsidiaries has therefore, any legal import insofar as their employer-employee relationships with UCB/API is concerned. Their positions differ from those of the lower ranking staff who were employed directly by the subsidiaries and remained as employees of the said subsidiaries notwithstanding the aforesaid transactions.

[19] It is the submission of the applicants that the Industrial Court was erroneous in concluding that the employers of the first and sixth respondents were the applicants. To the applicants, there has been a transfer of ownership of the applicants' manufacturing business which was carried out by the subsidiaries of the applicants from the applicants to the seventh respondent on 1st January, 1996 and operates as an automatic termination of employment of the first to sixth respondents with the applicants. The applicants argued that they therefore, not the employer of the first to the sixth respondents and contended that the first to sixth respondents' new employer was the seventh respondent at the time of the alleged constructive dismissal.

[20] With respect I am unable to agree. From the record, there is no evidence before the Industrial Court to show that there was in existence any agreement or even arrangement between the applicants and seventh or eighth respondents

regarding the first to sixth respondents employment status or that the seventh or eighth respondents had offered employment to the first to the sixth respondents, which offers were accepted by the first to sixth respondents. Thus, the Industrial Court has rightly concluded that the employers of the first to the sixth respondents were the applicants.

[21] The applicants also alleged that the Industrial Court in making the finding that the first to the sixth respondents were still the employees of the applicant at the time of the purported letter of 14 March 1996 was perverse as it had failed to take relevant matters into consideration but instead had taken irrelevant matters into consideration.

[22] The applicants were particularly not happy with the findings of the learned chairman of the Industrial Court, who held:

> In the absence of any evidence of any agreement or even arrangement between the parties on the matter of the claimant's employment status; or for that matter ESPI had agreement employment to the claimant, the court cannot possibly hold that ESPI is the new employer of the claimants. UCB continued until the date of the alleged constructive dismissal to be the employer of the claimants. UCB cannot avoid responsibility for their contractual obligation to the claimants as the latter's employer.

[23] Against the above findings, the applicants contended that the Industrial Court had failed to evaluate the evidence of COW–1 and COW–2. According to the applicant, both COW–1 and COW– 2 had given evidence to the effect that, as part of the sale of the four subsidiaries, the executives and managers were to go together with the Shah Alam operations in line with the Sale and Purchase Agreement relating to the four subsidiaries. The employees physically stationed in Shah Alam, including the first and sixth respondents, would be absorbed by the seventh respondent.

[24] Further, according to the applicants, COW–1 evidence in respect of the status of the first and sixth respondents' employment status was manifested in clause 1.01 of the Sale and Purchase Agreement where the "employees" were defined as:

> "… all the employees employed by each of the said companies including contract workers, seconded workers and any other workers within the Vendor's group of companies physically stationed and serving the said companies as at the date hereof.".

[25] According to the applicants, in this regard the first to the sixth respondents had confirmed that they had been stationed in Shah Alam throughout their employment with the applicants' group of companies and accordingly would be included in the definition of employees to be taken over by the seventh and eighth respondent. Thus, it is the submission of the applicants that the Industrial Court's finding that there is no evidence as

regards to the employment arrangements of the first to sixth respondent was in direct contradiction to the evidence before it.

[26] I am of the view that the issue whether the applicants were the employer of the first and sixth respondents at the time they considered themselves dismissed on 14 March 1996, was sufficiently considered by the learned chairman. In the body of the award, the learned chairman held as follows:

> When the subsidiaries disposed of their assets and API its shares in the subsidiaries to ESPI, the states of the claimant's employment was not addressed in the sale and purchase agreements between the vendors and the purchasers. Neither was there any arrangements made between the claimants and the contracting parties to the said agreement on the same. An issue therefore, arose as to the claimant's future employment. It appears that ESPI was reluctant to absorb the claimants. At a joint meeting between UCB and ESPI on 8 January 1996, ESPI in its agenda brought up amongst other things the issue of the employment of the management staff serving the subsidiary companies (Exhibit UCBB – page 51). According to WCM, the agenda was adopted. He and the other claimants came within item 2.02, that is, UCB would absorb them. It was the evidence of ESPI's sole witness, Hanif Pilus that he had been informed by ESPI's top management that the claimants would revert to UCB.
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> The issue of the employment of the six claimants was again raised in a meeting on 11th March 1996 (Exhibit UCBB – page 59). ESPI's representatives requested UCB to absorb the claimants. A representative of UCB, one Ruslan Zainal Abidin informed the meeting that it was ESPI's obligation under the sale and purchase agreement to absorm the claimants. However, he would forward ESPI's request to UCB's top management.
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> On 11 March 1996, which is the same day as the meeting between UCB and ESPI hereinbefore adverted to, five of the claimants received carbon copies of letter allegedly dated 12 January 1996 from UCB to the Inland Revenue Department informing the Department that the claimant had been transferred to Poly Paks (Export) Sdn. Bhd. and Star Art Sdn. Bhd, as the case may be. The claimants had not been issued any letters by UCB instructing that they transfer to the said subsidiary companies. They learnt of this alleged 'transfer' for the first time when they received the said carbon copies of UCB's letter to the Inland Revenue Department.
>
> The claimants as employees of UCB/API were contractually obliged to perform duties in any of UCB's subsidiaries and associated companies. As employers, UCB had the discretion to require the claimants at any time and from time to time to work in other places, to vary the nature of their duties and to require them to carry out duties in any other subsidiary or associated companies. The claimants cannot refuse to obey the lawful directions of UCB to perform duties for the seven subsidiaries at Shah Alam or indeed in any of UCB's any other subsidiaries. That does not, however, give UCB/API the power to transfer the contracts of service between them and the claimants to another legal entity, even if the same were a subsidiary company of UCB/API which is what UCB/API purported to do.
>
> The court has held that UCB/API had no right to transfer the claimants' contract of service to their subsidiaries. Even if UCB/API had such a right, the

court is of the view that the purported transfer of the claimants is clearly an after thought and done for a collateral purpose. No letters to the effect that they had been transferred on 1st January, 1996 were ever issued to them. It also appears that ESPI did not know of the said alleged 'transfers' of the claimants to Poly Paks (Export) Sdn Bhd and Star Art Sdn Bhd. On 13 March, 1996 it instructed five of the claimants to vacate their office rooms pending their transfer to UCB.

The court accepts the submission of learned counsel for the claimants that it is not just a coincidence that the claimants received carbon copies of letter written by UCB to the Inland Revenue Department, a third party, notifying the said department of their "transfers" allegedly two months earlier, on the same day as the meeting where ESPI indicated that they did not want to employ the claimants. It does appear to be an attempt by UCB to pre-empt ESPI Industries from sending the claimants back to UCB and to rid themselves of the claimants by sweeping them into the two subsidiaries which have become subsidiaries of ESPI Corp. It does not appear to be coincidental that the claimants were informed of their purported transfers immediately after they had pleaded constructive dismissal.

[27] From the abovesaid findings of the learned chairman, I am constrained to accede to the applicants' contention that the Industrial Court's findings is contrary to the evidence adduced before it. To me, the Industrial Court, had considered the evidence as a whole and has made findings of fact which this court should be slow in interfering, bearing in mind this is a judicial review.

[28] In this case it is pertinent to note that the Industrial Court had determined the date when the shares in the subsidiaries had been transferred and registered in the name of the seventh and eighth respondents. The Industrial Court concluded that the completion date took place sometime in 1996. According to the learned chairman, the sale of shares agreement expressly stipulated for the fulfilment of certain conditions precedent for the purpose of determine the completion date and the last condition was only fulfilled in September 1996. Further, the Industrial Court held that the seventh and eighth respondents did not take over the management and control of the Shah Alam operations on 3 January 1996 but made a finding of fact that there was a joint management from 1 March 1996 to September 1996, during which time the operations were conducted in the name of first applicant.

[29] Thus, when the Industrial Court held that, 'the court cannot possibly hold that ESPI is the new employer of the claimants', it had taken into account all the relevant matters into consideration. To me, the Industrial Court did not take into account irrelevant matters into consideration.

[30] It is also the submission of applicants that the Industrial Court had failed to address the fundamental issue that there was an instant change of ownership in the business and not a mere change in the shareholding of the management. According to the applicants, a change in the ownership of the business acts as an automatic termination of the employment of the employees with the old owners of the business. To the applicants, with effect from the date of change of ownership, the employees were employed by the new owners

and the transfer of ownership took place in January 1996, that is before the claim of constructive dismissal was made by the first to the sixth respondents. The applicants relied to the Federal Court decision in *Kumpulan Kamuning Sdn Bhd v Rajoo & 200 Others* [1983] 2 MLJ 400 to support the proposition, where Mohd Azmi FCJ stated:

> Without Regulation 8, the respondents' contracts of service with the appellant would under general law of master and servant come to an end, and they would be at the mercy of the new owner.

[31] With respect, and as can be seen from the body of the award, the Industrial Court was fully aware of *Kumpulan Kamuning*'s case, where he said:

> The case of *Kamuning* is distinguishable as the relevant agreement between the contracting parties therein carefully drew a distinction between the transfer of the business of the undertaking and the transfer of the assets of the undertaking. The former event takes place 'henceforth', that is from the effective date of the agreement whereupon the vendor is deemed to be carrying on the business of the undertaking for the purchaser. The latter event, however, was intended to occur subsequently the agreement providing that the 'actual' completion of the transfer of the undertaking shall be completed as soon as possible after the execution thereof when the vendor shall deliver to the purchaser instruments of transfer of all assets hereby agreed to be sold as are usually transferred by instrument of transfer and the purchaser shall pay the consideration to the vendor.

[32] I am of the view that the learned chairman had correctly distinguished the *Kumpulan Kamuning*'s case with the present case. The *Kamuning*'s case is distinguishable on the following grounds:

(i) The High Court in *Kamuning*'s case accepted that the agreement was for the sale and purchase for the active undertaking of the estate and that what was involved was not merely assets but the business of Kerling Estate which included its assets. In contract, in the present case, there was only a sale of assets and sale of shares.

(ii) In *Kamuning*'s case, the agreement provided that the actual completion of the transfer of the undertaking shall be completed as soon as possible after the execution thereof and the vendor shall deliver to the purchased instruments of transfer of all assets thereby agreed to be sold as are usually transferred by instrument of transfer and the purchaser shall by the consideration to the vendor. In our case, the completion date is defined under cl 1.01 as 120 days from the date of the share sale agreement or on the day, the last condition precedent is fulfilled.

[33] Thus, I am of the view that the Industrial Court did not err in law or acted in excess of its jurisdiction when it held that, 'the court cannot possibly hold that ESPI is the new employer of the claimants'. The first applicant continued until the date of the alleged constructive dismissal to be the employer of the first to the sixth respondents.

[34] In conclusion, the Industrial Court in arriving at its Award No 632 of 1998 does not suffer any form of irregularities in law that need to be corrected by this court. Accordingly, the applicants' application is dismissed with costs.

Application dismissed.

Reported by Lim Lee Na